DPS Legal Review

September 2018 | Volume 17 No. 9

Georgia Department of Public Safety | Legal Services Office | (404) 624-7423

11th Circuit Court of Appeals

USE OF FORCE – REPEATED USE OF TASER

Drivers on an interstate near the city of Argo, Alabama, observed a vehicle being driven erratically and at high speeds and called the police to report the incident. The vehicle in question was being driven by Bob Glasscox, who is a Type 1 diabetic. Unbeknownst to the other motorists, Glasscox was suffering from a "severe hypoglycemic episode" that caused his erratic driving. Officer David Moses from the City of Argo Police Department responded and "began following Mr. Glasscox, who was 'doing about 80' in a 70 mile-per-hour zone." The subsequent events were captured on Officer Moses' body-worn camera. "Officer Moses activated his emergency lights and siren, yet Mr. Glasscox's truck began to accelerate, weaving from the fast lane onto the median of the divided highway and narrowly missing some roadside signs and a guardrail." The pursuit continued for approximately 5 miles until Glasscox eventually stopped in the median near the oncoming lanes of travel.

Officer Moses exited his vehicle and "ran to the driver's side of Mr. Glasscox's truck," in a position close to oncoming traffic. Officer Moses had both his firearm and his taser drawn. He pointed his weapons into the driver's side window and ordered Glasscox to show his hands. Glasscox then "raised his hands, which were empty. Officer Moses opened the driver's side door and shouted, 'Get out of the car!'" Glasscox initially had difficulty exiting the vehicle because his seatbelt was still buckled, but after further commands, he unbuckled his seatbelt. Officer Moses then again ordered Glasscox to get out, and Glasscox began to respond "I'm going to get out if you'd shut up." He was interrupted by Officer Moses stating "Don't you reach," in response to Glasscox appearing to reach toward his right side. Officer Moses deployed his taser into Glasscox immediately after issuing this command. Officer Moses then holstered his firearm.

In response, "Glasscox screamed, shook, and writhed in pain with his arms and hands curling toward his chest." Officer Moses was able to see both of Glasscox's hands during this time. After the first shock concluded, Officer Moses again ordered Glasscox out of the car, but Glasscox, still howling, "attempted to pull one of the taser wires from his chest." In response, Officer Moses triggered his taser again. During the second deployment, Glasscox again shook, screamed, and writhed in pain, and Officer Moses ordered him to "Stop it! Get out of the car!" After the second shock ended, "Officer Moses yelled, 'I'll give it to you again! Get out of the car!'" Glasscox responded, "I'll get out if you just leave me alone!"

Officer Moses then approached and grabbed Glasscox by the wrist and demanded again that Glasscox "get out," then tasing Glasscox a third time. During the third taser deployment, Glasscox shouted "I will!" About six seconds passed between the second and third taser deployments. During the third deployment, and while Glasscox was "still shaking uncontrollably and writhing from the shock," Officer Moses again yelled "[g]et out of the car!" while holding Glasscox by the wrist. Glasscox again shouted "I will!" in response. "Less than two seconds later, before Mr. Glasscox had a chance to get out of the truck, Officer Moses deployed his taser a fourth time, first aiming the taser near Mr. Glasscox's chest and then bringing the weapon to the side of Mr. Glasscox's thigh for direct contact. As he brought the taser to Mr. Glasscox's thigh, Officer Moses yelled, 'Stop it!'" Eventually, after the fourth taser deployment, Glasscox was able to swing his legs out of the car and stand, at which point Officer Moses handcuffed him.

Once Glasscox was secure, Officer Moses removed the taser wires from his chest and asked, "'[w]hat is wrong with you, sir?'… Glasscox responded that he is a diabetic and his blood sugar was low." Responding EMS confirmed that Glassox had severe low blood sugar, which caused his erratic driving.

Glasscox later sued Officer Moses and the City of Argo for excessive use of force in violation of the Fourth Amendment. The defendants moved for summary judgment, arguing that Officer Moses did not use excessive force and that he was entitled to qualified immunity. The district court denied the motions and the defendants appealed to the Eleventh Circuit.

The Eleventh Circuit held that Officer Moses and the City were not entitled to summary judgment or qualified immunity because (1) a jury could reasonably find that Officer Moses' use of force was excessive; and (2) it was clearly established as a matter of law that such use of force was excessive. With respect to the first finding, the Court explained that "[e]ven if the arrestee's resistance justified deployment of a taser initially, if he has 'stopped resisting ... during this time period,' further taser deployments are excessive." In this case, **"[e]ven assuming that Officer Moses reasonably deployed his taser twice, a reasonable jury could find that the continued tasing—when the video recording conclusively shows that Mr. Glasscox was not resisting but instead voicing his desire to comply with the officer's commands, provided he was given a chance to do so—violated Mr. Glasscox's Fourth Amendment right to be free from the excessive use of force."** The Court went on to hold that the excessive nature of Officer Moses' use of force was clearly established by existing case law, and thus he was not entitled to qualified immunity. Thus, Glasscox's claims should be allowed to be heard by a jury. *Glasscox v. City of Argo*, No. 16-16804, 2018 WL 4346357 (11th Cir., Sept. 12, 2018).

REASONABLE EXPECTATION OF PRIVACY IN GIRLFRIEND'S CAR BY PASSENGER

During the summer of 2013, the City of Miami Police Department began investigating a group of drug dealers that included Rodolfo Portela. "On November 18, 2013, Officer David Segovia… stopped a car driving on the wrong side of the road. The driver was Portela's girlfriend, and Portela was in the front passenger seat." Officer Segovia smelled marijuana coming from the vehicle and, upon questioning, Portela admitted "that he had a bag of marijuana on his person." Officer Segovia also observed loose particles of marijuana on the floorboard of the car and "observed a gun under the front passenger seat." Portela was placed under arrest based upon existing warrants and later made incriminating statements while in custody. Portela was subsequently charged with crimes relating to – among other things – his possession of the firearm found in the vehicle.

During his prosecution, Portela moved to suppress "both the gun found in his girlfriend's car and his post-arrest statements because the search of the car violated his rights under the Fourth Amendment." The district court denied his motion, finding that he lacked standing to challenge the search of the car because he was merely a passenger in the vehicle and had no reasonable expectation of privacy in it. Portela appealed this ruling to the Eleventh Circuit.

The Eleventh Circuit upheld the trial court, explaining that a fourth amendment challenge to a search can only be raised by a person with a "reasonable expectation of privacy" in the place searched. A passenger in a vehicle only has a reasonable expectation of privacy in that vehicle if he or she has a "possessory interest in the vehicle." The Court further explained that "[t]he term 'possessory interest' means 'the present right to control property, including the right to exclude others, by a person who is not necessarily the owner'; or 'a present or future right to the exclusive use and possession of property.'" In this case, Portela argued that he had a possessory interest in the car because he (1) had "permission to use the car any time he wanted;" (2) "had the spare key to the car;" (3) "left personal belongings in the car;" and (4) "paid to repair the car, and sometimes purchased gas."

The Court nevertheless rejected Portela's argument that he had a possessory interest in the car. The Court held that "**Portela did not have 'exclusive custody and**

control' of the car… when the legal owner was driving it and he was a mere passenger. That he may have used the car on other occasions, even frequently, does not give him a durable interest in the car equivalent to that of the legal owner and driver." As such, he had no reasonable expectation of privacy in the vehicle and could not object to a search of it on the grounds that the search violated the fourth amendment. *United States v. Dixon*, No. 15-14354, 901 F.3d 1322 (11th Cir., Aug. 24, 2018).

Georgia Supreme Court

SEARCH OF HOME WITHOUT WARRANT FOLLOWING INFANT DEATH

On December 3, 2015, Arielle Turner and her mother, Terry Turner, called 911 to report that Arielle's 10-week old child was non-responsive. EMTs arrived and eventually transported the child to the hospital along with Arielle while Terry Turner remained home. Douglasville Police Officer Joseph Wells then responded to the house and encountered Terry – very upset – on the front porch of the home. Officer Wells spoke with Terry until she eventually "requested that they go inside and sit, noting that her legs were hurting and that it was cold outside. Officer Wells agreed, followed Terry inside the home, and sat down at the kitchen table." Detective Victoria Bender also responded and "entered the home through an already open front door and sat with Terry and Officer Wells." Neither officer searched the house nor did they seize any property at this time.

At the hospital, meanwhile, Arielle's infant child died. Investigators at the time believed that death to be accidental and did not suspect foul play. Detective Bender was notified of the child's death and informed Terry, then explained that "the home was a crime scene which no one was allowed to leave or enter. Shortly thereafter, more officers arrived, including a crime scene investigator who, at some point, began photographing the residence" while Detective Bender questioned Terry and asked her to "take her around and tell her what went on last night." Terry did not consent to the officers entering or to any search, but "did not stop the officers because Detective Bender 'just told me that's what they was [sic] supposed to do.'"

Arielle Turner was returned to the residence by another officer. Law enforcement officers were still inside the home with Terry when they arrived. The Chief Coroner for Douglas County also arrived around the same time, entered the home, and began looking around the home in connection with a sudden infant death investigation. Arielle answered questions from Detective Bender regarding "specific items that were part of the baby's sleep environment," some of which law enforcement later seized. One officer also took a cell phone video while inside the home. Officers did not obtain a search warrant, did not ask permission to search the home, and did not have probable cause for the search, but rather believed that the search was justified "pursuant to Georgia's Death Investigation Act."

Following an investigation, Arielle was indicted for the death of her child. Arielle subsequently moved to suppress all items seized from her home, arguing that the search was unlawful. Following a hearing, the trial court granted Arielle's motion. The prosecution then appealed the ruling to the Georgia Supreme Court.

The prosecution first argued before the Georgia Supreme Court that the search was lawful because Terry and later Arielle provided consent. The Georgia Supreme Court first explained that, under the Fourth Amendment, consent must be "freely and voluntarily given under the totality of the circumstances" and not be mere acquiescence to law enforcement. Moreover, "the standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?" The Court explained that under these standards, **Terry's initial consent for Officer Wells' to enter the home was *not* consent for additional officers to enter or conduct a search of the home. After consenting to Officer Wells' entry, "the record supports the trial court's conclusion that Terry merely acquiesced to the authority of law**

enforcement rather than voluntarily consenting to the search of her home."

Moreover, the Court explained, the officers never obtained consent from Arielle to search the home once she returned. Finally, **the officers could not rely upon the Georgia Death Investigation Act to justify the search, because searches pursuant to that act must be *led* by the coroner. In this case, the search was well underway and was clearly being led by law enforcement prior to the arrival of the coroner.** Because officers did not obtain a warrant for the items seized at the home and because the search and seizure was not justified by any exception to the warrant requirement, the Court held that the items were seized illegally and should be excluded from evidence. *State v. Turner*, No. S18A0957, 2018 WL 4054815 (Ga., Aug. 27, 2018).

Georgia Court of Appeals

IMPLIED CONSENT WARNING – OVERSTATING ALLOWABLE BAC

On December 3, 2015, a Douglasville police officer responded to a call regarding property damage at a gas station caused by a tractor-trailer. The officer determined that a tractor-trailer driven by Irving Gelzer had struck and damaged a metal pole at the gas station. Gelzer told the officer during the investigation that he had a commercial driver's license, but "when the officer ran Gelzer's driver's license through dispatch, it was revealed that Gelzer did not have a CDL and that his Florida driver's license was suspended." Based on his investigation, the officer determined that Gelzer was under the influence of alcohol while operating the vehicle and arrested him "for driving under the influence while driving a commercial vehicle and for driving with a suspended license."

After placing Gelzer under arrest, "[t]he officer… read Gelzer Georgia's Implied Consent Notice for suspects who are age 21 and over," which states in part "that a suspect's Georgia driver's license… may be suspended for a minimum of one year if the suspect either refuses chemical testing or the testing reports a blood alcohol content of 0.08 grams or more." By comparison, the notice for *commercial vehicle drivers* provides that a suspension of at least one year will occur if chemical testing is refused or "the testing reports a [BAC] of 0.04 grams or more." After being read the warning, Gelzer agreed to a chemical breath test, which later indicated a BAC of 0.198.

During his prosecution, Gelzer moved to suppress the results of the breath test, arguing that his consent was not valid because the officer read him the incorrect implied consent notice. The trial court denied Gelzer's motion, stating that the difference between the implied consent notice for suspects who are age 21 and over and that for commercial vehicle drivers was "within the range of substantial compliance and did not render the warning insufficiently accurate." Gelzer then appealed this ruling to the Georgia Court of Appeals.

The Georgia Court of Appeals stated that the key in determining whether the implied consent notice was read in a satisfactory manner is "whether the notice given was substantively accurate so as to permit the driver to make an informed decision about whether to consent to testing." The Court held in prior cases that "overstatement, as opposed to understatement, of the legal limit of blood alcohol concentration is the type of misinformation that might cause someone to submit to testing who might otherwise refuse." The parties in this case stipulated that Gelzer should, in fact, have been read the implied consent notice for commercial motor vehicle drivers. As such, the Court explained, the arresting officer improperly overstated the BAC which would lead to a driver's license suspension. The Court held that **"the trial court erred in concluding that the difference between the 0.08 legal limit applicable to suspects age 21 and over and the 0.04 legal limit applicable to commercial vehicle drivers is not a substantial change." As such, the results of the test were improperly allowed into evidence.** *Gelzer v. State*, No. A18A1067, 2018 WL 4102307 (Ga. Ct. App., Aug. 29, 2018).

DUI ARREST – VOLUNTARINESS OF CONSENT BY 17 YEAR OLD

On September 26, 2015, a police officer stopped 17-year-old Emma Bergstrom at a roadblock. The

officer observed that Bergstrom "smelled strongly of alcohol, and that her eyes were bloodshot and glossy. Bergstrom agreed to take a police administered preliminary breath test," which tested positive for the presence of alcohol. Bergstrom then admitted to drinking alcohol "a few hours before the stop."

"The officer arrested Bergstrom and immediately read her Georgia's implied consent notice for DUI suspects under 21 years of age." Bergstrom agreed to a chemical breath test by stating, "yeah, I'll do whatever you want me to do." Bergstrom subsequently became very upset and made statements including "'my mom's going to hate me forever' and 'oh my God, I'm such an idiot. I hate myself. I'm going to kill myself.'" Bergstrom's chemical breath test indicated a BAC of 0.115 and she was subsequently charged with DUI under 21 and DUI less safe. During her prosecution, Bergstrom moved to suppress the results of the breath test, arguing that "Georgia's implied consent statute is unconstitutional on its face and as applied to her." The trial court denied her motion and Bergstrom was found guilty. She appealed, arguing that her motion to suppress should have been granted.

The Georgia Court of Appeals first denied Bergstrom's argument that Georgia's implied consent notice is, on its face, unconstitutionally coercive. The Court of Appeals relied on its earlier decision in *Olevik v. State* and, as in that case, held that **"the implied consent statute has a plainly legitimate sweep in that it does not impose criminal penalties for refusing to submit to chemical testing." Furthermore, the implied consent notice does not create "widespread confusion about drivers' rights and the consequences for refusing to submit to a chemical test or for taking and failing that test." As such, the implied consent notice is not unconstitutional on its face.**

The Court also rejected Bergstrom's argument that the implied consent notice was unconstitutional as applied to her because she did not voluntarily consent to the testing under the totality of the circumstances. The Court stated that a number of factors, including "the age of the accused, her education, her intelligence, the length of detention, whether the accused was advised of her constitutional rights, the prolonged nature of questioning, the use of physical punishment, and the psychological impact of all these factors on the accused" should all be considered in determining voluntariness. Here, however, the trial court considered those factors and determined that Bergstrom's consent was nevertheless voluntary. The Court held that **"[w]hile it is undisputed that Bergstrom was upset throughout the encounter, the record, including a video recording of Bergstrom's encounter with the arresting officer, sufficiently demonstrates that she consented to the state-administered breath test. As the trial court said, 'it cannot be the law that every time a 17 year old is read implied consent that implied consent is, per se, not understood and coercive.' Accordingly, Bergstrom's as applied challenge must also fail."** *Bergstrom v. State*, No. A18A1218, 2018 WL 4376197 (Ga. Ct. App., Sept. 14, 2018).

ALS REMINDER

Withdrawing an ALS: See Department of Driver Services Rules and Regulations 375-3-3-.04(6)(b)(2).

1. A DUI driver has thirty calendar days from the issuance or service of the 1205 Form to request an ALS hearing. If the DUI driver does not timely request a hearing during that time period, then the arresting officer may **not** withdraw the suspension once the 30 days have passed.
2. If an ALS hearing is timely requested and scheduled, the arresting officer may withdraw the ALS. Once a decision has been issued by the Administrative Judge suspending the driver's license, however, the arresting officer may **not** withdraw the suspension.
3. Once the Administrative License Suspension has taken effect, the suspension cannot be withdrawn by the arresting officer unless the 1205 form was issued in error.
4. Please contact Dee if you have any questions regarding withdrawing an ALS case.

Published with the approval of
Colonel Mark W. McDonough.

Legal Services
Melissa Rodgers, Director
Joan Crumpler, Deputy Director
Dee Brophy, ALS Attorney
Zack Howard, Legal Services Officer